JOHN T. FEY, C

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 455

MARINE TERMINALS CORP.,
a corporation,
Petitioner,

vs.

AMERICAN PRESIDENT LINES, LTD.,
a corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

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Petitioner, Marine Terminals Corp., a corporation, hereinafter referred to as "petitioner" or "Marine Terminals", respectfully presents to this Honorable Court its petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review a final judgment made and entered by that

Court on June 14, 1956, a rehearing thereof having been denied on July 19, 1956.

OPINIONS BELOW.

The opinion of the Court of Appeals was rendered and filed on June 14, 1956, is set forth in the appendix hereunto and is reported at this time, in 1956 A.M.C. 1229.

JURISDICTION.

(a) The judgment of the Court of Appeals for the Ninth Circuit reversing the interlocutory decree of the District Court for the Northern District of California, Southern Division, was dated and entered on June 14, 1956.

(b) Petition for Rehearing, timely filed on July 2, 1956, was denied by the Court of Appeals on July 19, 1956. The Court of Appeals has stayed its mandate pending the filing and consideration of this petition for writ of certiorari.

(c) Jurisdiction is conferred upon this Court to review the judgment of the Court of Appeals by Title 28 U.S.C. 1254(1), this petition for certiorari being filed within the time prescribed by Title 28 U.S.C. 2101(c).

STATUTE INVOLVED.

The Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, Chapter 509, Section 5, 44 Stat. 1426, 33 U.S.C. Section 905, which provides as follows:

> "Exclusiveness of liability. The liability of an employer prescribed in section 904 of this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, defendants, next of kin and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee."

QUESTIONS PRESENTED.

1. Does the decision of this Honorable Court in *Ryan Stevedoring Co., Inc. v. Pan-Atlantic Steamship Corp.,* 350 U.S. 124, mean that under the contractual theory the contractor shall be liable for

indemnity without regard to the comparative proportions of negligence between its employees and the employees of the shipowner?

2. Does not the decision of the *Ryan* case mean that liability for indemnity based on an implied contractual basis is limited to situations where the contractor's negligence was the sole, primary or active cause of injury?

As pointed out by Mr. Justice Black in the dissenting opinion in the *Ryan* case, these questions are unanswered in the majority opinion of this Honorable Court. The answer to the two questions stated are left open in the *Ryan* case and we respectfully request that the questions be answered.

3. What "consensual obligations" are assumed by the contractor where the very instrumentality which was a joint and concurrent cause of the accident was knowingly supplied by the ship and used by the contractor?

4. This Honorable Court in footnote 6 of its majority opinion in the *Ryan* case said "we do not reach the issue of the exclusionary effect of the compensation act upon a right of action of a shipowner under comparable circumstances without reliance upon an indemnity or service agreement of a stevedoring contractor".

We therefore ask:

Where an action for indemnity, as in the case at bar, was predicted on the basis of comparative negligence of the shipowner and the contractor, did

this Honorable Court in the *Ryan* case mean that indemnity on implied contract or breach of "consensual" obligations permits indemnity irrespective of joint and concurrent negligence of the shipowner and irrespective of the provisions of the compensation act?

5. May the ship exculpate itself from its own joint and concurring negligence by merely notifying the contractor that it believes there are one or a number of unseaworthy conditions present on the ship and thus place the stevedore in the position of an insurer?

6. Was recovery for indemnity under such a situation contemplated by the *Ryan* case?

7. The Court of Appeals of the Ninth Circuit, in the case at bar, recognized that in the *Ryan* case there was no act of unseaworthiness or negligence prior to the accident, as the *Ryan* case involved failure to discover and correct a breach of duty by the stevedore. In this case we are concerned with a dangerous situation created by the ship and joint and concurrent negligence on the part of both the ship and the contractor. Does the *Ryan* case overrule the doctrine of *Halcyon Lines and Vinke v. Haenn Ship Ceiling and Refitting Corp.*, 342 U.S. 282, and *American Mutual Liability Ins. Co. v. Matthews*, 182 Fed. 2d 324, which preclude recovery for indemnity where there is joint and concurrent negligence, in the absence of an express contract for indemnification?

8. Where there is joint and concurrent negligence on the part of both the ship and the contractor, does

not compliance by the contractor with the compensation act bar recovery of indemnity in the absence of an indemnity agreement?

STATEMENT OF THE CASE.

On January 29, 1952, the President Polk was in San Francisco, and the agents, servants and employees of petitioner, Marine Terminals, went aboard for the purpose of discharging the vessel's cargo.

There was a written stevedoring contract between the parties. (Plffs. Ex. 16, Tr. 48.) This contract contained no agreement, covenant or language for indemnity.

When the vessel arrived in port some of the strongbacks or hatch beams were entirely devoid of locking devices. (Tr. 289.) This information was conveyed by the mate of the vessel to Ernest Bleile, the walking boss for Marine Terminals. (Tr. 288-289.) Bleile then instructed the gangs to remove excess beams from No. 1 hatch and to place them on deck. He also instructed the removal of any unsafe beams *that might be found.* (Tr. 293.) It is undisputed that the mate of the vessel did not specifically call attention to or point out any particular beams which lacked locking or safety devices. The mate merely reported to Mr. Bleile:

> "That he would like me to remove all excess beams which I didn't use for handling cargo,

because he had some beams on the ship which had faulty locking devices." (Tr. 289.)

Asked more specifically concerning this conversation with the first mate, Mr. Bleile said (Tr. 289):

"He called me below. He said 'Will you keep your eyes open? I believe I have strongbacks here which have no locks.'"

On the second day of the unloading one defective hatch beam in number one hold *which did not have any locking devices* was dislodged *without negligence* on his part by the bridle and hook of the winch driver, Paquette, and fell into the lower hold causing personal injuries to the stevedore, Mr. Williams. (Tr. 115, 116, 126.)

The operation of the winch operator, Mr. Paquette, who testified on behalf of the respondent, reveals that the cause of the accident was *the lack* of the locking device (Tr. 164), and that had the locking device been on the beam the bridle and hook could not have dislodged it, that very little weight is required to dislodge an unlocked strongback (Tr. 164) and that it was the sole duty and responsibility of the ship to "install the lock" (Tr. 168) and that the locks used in the case at bar were part of the strongback (Tr. 168). This testimony was corroborated by the respondent's witness, Mr. Reuben Swanson. (Tr. 189.)

It is undisputed that it was the duty of the ship to supply, repair, install and maintain the locking devices. (Tr. 168.) The evidence is likewise conclusive that the ship did not supply any substitute locking

devices or other equipment for the purpose of securing the hatch beam in question.

The injured stevedore, Williams, filed an action in the California State Court (Tr. 7-12) charging respondent with tortious negligence in "carelessly and negligently providing unsafe and improper loading gear and strongbacks" and that they "so carelessly and negligently failed to provide proper and adequate or other safety devices for securing in place of the strongbacks." Your petitioner was neither a party to nor were they interpleaded in the State Court action by any third party or indemnity action. (Findings of Fact No. 16, Tr. 34, 35.)

Mr. Williams, the injured stevedore, was covered by the Longshoremen's and Harbor Workers' Compensation Act, by his employer, your petitioner, and received both compensation and medical care, attention and expenses pursuant to said Act. (Findings of Fact No. 12, Tr. 34.)

The respondent settled the State Court action with Mr. Williams and then filed its action against petitioner for indemnity based *entirely and solely on allegations of tortious negligence* in having its employees "working in a dangerous, unsafe, and unseaworthy place due to the imminent danger of said hatch beams becoming dislodged from its position during cargo handling operations and falling into the hatch." (Tr. 4, Par. IV of Complaint.)

Nowhere in the Complaint filed by respondent against petitioner is any alleged breach of contract

or warranty as to the method of doing over work under the contract, either alleged or mentioned.

The issue on the trial of this case was entirely on *whose tortious negligence towards the injured stevedore was the greatest* or active v. passive negligence.

It was on these pleadings and on the evidence detailed that the trial judge denied indemnity.

The Court of Appeals has reversed the judgment of the trial judge because in their opinion the *Ryan* case (supra) compels such reversal.

REASONS FOR GRANTING THE WRIT.

The proper interpretation of this Court's decision in the *Ryan* case in respect to actions brought without reliance upon contractual obligations and based entirely upon concepts of related degrees of tortious conduct towards an employee of the stevedoring company is of great importance to the future contracts and conduct of business of stevedoring companies throughout this country.

As interpreted by the Court of Appeals, the *Ryan* case means that one joint tort-feasor may recover from the other without regard to the effect of Workmen's Compensation, and in the absence of indemnity agreements. Further that the stevedoring contractor must indirectly respond for damages recovered by its employee and recovered solely from the joint tort-feasors.

The interpretation by the Court of Appeals of the *Ryan* case is in direct conflict with its own decisions and those of other Federal Courts.

As was said in *Union Sulphur and Oil Corporation v. Jones & Son,* 195 Fed. 2d 93 (C.A. 9, 1952):

> "We agree with the District Court that upon the facts proven the Court properly found that the negligence of Union Sulphur and Jones, Inc. jointly caused the injury to Marshall. Hence our decision in the Rothschild case is not applicable."

It was held in *American Mutual Liability Ins. Co. v. Matthews,* 182 Fed. 2d 332 (C.A. 2), in part as follows:

> "In the case at bar no promise by the employer can be implied that he will not use equipment furnished him by the shipowner to be used for the very purpose to which it was put, nor can a promise be implied that he will use care to detect any defect in the equipment which patently existed when the equipment was delivered for use by the employers. To imply such a promise would mean that the employer agreed to protect the shipowner against liability arising out of the shipowner's own negligence. In the *absence* of an express promise, such an implication would be utterly unreasonable, hence we can find no contractual basis for indemnity or contribution. To impose a non-contractual duty of contribution on the employer is pro tanto to deprive him of the indemnity which the statute grants him in exchange for his absolute, although limited, liability to secure compensation to his employees."

In accord:

Shannon v. U. S., 119 F. Supp. 706 (D.C. N.Y.);

Slattery v. Marra Bros., 186 F. 2d 134 (CCA 2, 1951);

Hawn v. Pope & Talbot, Inc., 198 F. 2d 800 (CCA 3, 1952);

Halcyon Lines v. Haenn Ship Corp., 342 U.S. 283.

We sincerely feel and believe that the principles or concepts heretofore clearly entrenched in our decisions, concerning the relationship of employer and employee as codified in the Longshoremen's and Harbor Workers' Compensation Act do preclude an employee from obtaining an additional recovery from his employer by merely suing the ship and obtaining a substantial settlement, in the absence of an indemnity agreement.

This is, we believe, particularly true where the ship is concurrently negligent in causing the injuries to the employee.

It is possible, of course, but we do not so believe that the *Ryan* case has overruled these established precedents and we respectfully point out that the Court of Appeals in the case at bar in applying the principles of the *Ryan* case was well aware of this distinction between the two cases where the Court said (opinion, appendix, p. 10):

> "It is true *that here, unlike Ryan, there was act of unseaworthiness or negligence by the ship-*

owner prior to the conduct of Marine and that the shipowner's negligence consisted of failing to supply a proper device, rather than a failure to discover and correct the breach of duty as in the Ryan case. But this is no ground of distinction, for in the case at bar, as in *Ryan,* it was the stevedore's breach of duty that created the danger and made it an active condition with immediately foreseeable consequences of personal injury." (Added emphasis ours.)

Yet this Honorable Court in the *Ryan* case did, we believe, clearly have in mind the distinction between actions based on comparative and related tortious stowage of cargo and actions predicated on contractual obligation, as this Court in its opinion said (p. 237, 76 S. Ct. Rep.):

"On the other hand, the shipowner's action for indemnity here is not based merely on the ground that the shipowner and contractor each is responsible in some related degree for the tortious stowage of cargo that caused injury to Palazzolo. Such and action, brought without reliance upon contractual undertakings, would present the bold question whether the stevedoring contractor or the shipowner, because of their respective responsibilities for the unsafe stowage, should bear the ultimate burden of the injured longshoreman's judgment. That question has been widely discussed elsewhere in terms of the relative responsibility of the parties for the tort, and those discussions have dealt with concepts of primary and secondary or active and passive tortious conduct. Because respondent in the in-

> stant case relies entirely upon petitioner's contractual obligation we do not meet the question of noncontractual right of indemnity or the relation of the comparison to such a right."

If consensual obligations are to be the only test of liability between the shipowner and the contractor, what may be said of the reciprocal duties of the shipowner in reference to the fitness of the gear or equipment above required to be furnished by said shipowner for the use of the contractor? Would it not be equitable to place the ultimate liability upon the party furnishing the defective gear causing the injury? Does the shipowner warrant that he has exercised reasonable care in furnishing and inspecting such gear or equipment or does the warranty become a one-sided thing flowing unilaterally from the contractor to the ship?

In the *Ryan* case the breach of contract and warranties that were considered was the breach of the contractor Pan-Atlantic in relation to the "warranty" or "consensual obligation" arising out of the agreement, and Pan-Atlantic was held liable. The negligence of Pan-Atlantic was said to be failure on their part to discover or correct the unsafe stowage. This, we submit, is an entirely different thing than the situation in the case at bar where the ship knowingly supplied the very defective and offending beam which was dislodged by petitioner. In fact the negligence of petitioner herein is remarkably similar to that of the ship in the *Ryan* case in that petitioner failed

to discover and correct (by removal) the offending beam.

This distinction seems to be well recognized on page 153 of the *Ryan* case where this Court in part said:

> "* * * this contractor, as the warrantor of its own services, cannot use the shipowner's failure to discover and correct the contractor's own breach of warranty as a defense."

As was pointed out by Mr. Justice Black in writing the dissenting opinion, the effect of the negligence of the shipowner (described as the failure to discover and correct the breach of warranty to safely stow) is not considered in reference to the situation (as in the case at bar) where the shipowner is a joint tort-feasor, where such participation in the tort to the injured employee should preclude recovery. *Halcyon Lines & Vinke v. Haenn Ship Ceiling and Refitting Corp.*, 342 U.S. 282.

OTHER RELATED MATTERS.

While we believe that the main questions presented and reasons why certiorari should be granted have been clearly set forth, we desire to briefly mention several related matters that we feel are of importance and resulted in an erroneous decision by the Court of Appeals.

1. The findings of fact and conclusions of law of the trial judge are said by the Court of Appeals to be in conflict. While it is true that finding of fact No. 12 (Tr. 34) stated:

> "That plaintiff's negligence was passive and that the defendant continued to work with the knowledge of the dangerous condition of the defective condition of the defective strongbacks."

and that conclusions of law No. 4 (Tr. 36) stated:

> "That the concurring negligence of the shipowner went well beyond a mere passive act of negligence based on its non delegable duty to furnish a seaworthy ship and a safe place to work",

nevertheless the trial Court also concluded in conclusion of law No. 5 (Tr. 36) as follows:

> "Although Mr. Williams' (the stevedore) injuries proximately resulted from the joint and concurring negligence of the ship (Plaintiff) the stevedoring company (defendant), plaintiff's demand for indemnity against the defendant must be denied upon the authority of *American Mutual Liability Ins. Co. v. Matthews,* 182 Fed. 2d, 332, 2 Cir., and *Halcyon Lines v. Haenn Ship Refitting Corp.,* 342 U.S. 382."

We believe that the Court of Appeals' statement that there is a conflict between these findings and conclusions is in error, and that under the rules of interpretation of ultimate findings of probative facts, the concurring negligence of the shipowner is properly determined under the uncontradicted evidence

and the ultimate findings control. *Winnett v. Helvering*, 68 Fed. 2d 614 (C.C.A. 9).

2. We also desire to point out that the Court of Appeals reversed the decision of the trial judge, under its interpretation of the *Ryan* case on the theory of breach of contract which was not pleaded nor considered in the trial. We had urged in our petition for rehearing (pp. 13-14) alternatively that a retrial should have been ordered on these issues, under the decision of this Court in *American Stevedores v. Porello*, 330 U.S. 458, where this Court in part said:

> "From the record it is not clear whether the District Court made any finding as to the meaning of the contract. We believe its interpretation should be left in the first instance to that court, which shall have the benefit of such evidence as there is upon the intention of the parties. If the District Court interprets the contract not to apply to the facts of this case, the court would, of course, be free to adjudge the responsibility of the parties to the contract under applicable rules of admiralty law. We therefore affirm the decree of the Circuit Court of Appeals as to Porello. We reverse so much of the decree as awards indemnity to the United States under the contract and remand the case to the District Court for determination of the meaning of the contract."

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
September 14, 1956.

Respectfully submitted,
JOE CRIDER, JR.,
Proctor for Petitioner.

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M. K. TAYLOR,
FREDERIC G. NAVE,
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(Appendix Follows.)

Appendix

OPINION OF COURT BELOW.

United States Court of Appeals
for the Ninth Circuit

American President Lines, Ltd., a corporation, Appellant, vs. Marine Terminals Corp., a corporation, Appellee.	No. 14,959 June 14, 1956

Appeal from the United States District Court
for the Northern District of California
Southern Division

Before: Healy and Chambers, Circuit Judges, and Hamlin, District Judge

Hamlin, District Judge:

This action was brought in the District Court for the Northern District of California, Southern Division, by appellant, American President Lines, Ltd., a Delaware corporation, hereinafter called American, against Marine Terminals Corp., a Nevada corporation, appellee, hereinafter called Marine, to recover

indemnity in the amount of $62,500. This amount was the sum which American had paid to Robert B. Williams, a longshoreman employed by Marine, in settlement for injuries received by Williams on January 30, 1952, while he was aboard the steamship President Polk, a vessel owned by American, and was performing stevedoring work thereon pursuant to a contract between American and Marine for stevedoring services on American's vessels. The case was tried to the Court without a jury and the District Court rendered judgment for Marine, the defendant there, denying the indemnity sought by American. This appeal is from that judgment. No contention is made here that American was not liable for the amount it paid to Williams or that the amount is not reasonable. The sole question presented is whether or not under the circumstances American is entitled to indemnity from Marine for the amount it was required to pay.

Prior to the injury appellant American and appellee Marine, a stevedoring contractor, entered into a written contract for stevedoring services to be performed aboard appellant's vessels. The contract between American and Marine was introduced in evidence. This contract contained no agreement, covenant or language of indemnity, but did provide *inter alia* as follows: That Marine should—

> "* * * b. Provide all necessary stevedoring labor, including winchmen, hatch tenders, tractor and fork lift operators, foremen and such other stevedoring supervision as are needed for the proper and efficient conduct of the work and for the vessel's utmost dispatch.

c. Adjust rigging of booms, guys and other ordinary cargo tackle at hatches where work of discharging and/or loading will be conducted as required in the operation, and readjust when completed. Remove and replace beams, hatch covers and tarpaulins."

On January 29, 1952, a stevedoring gang employed by Marine boarded the vessel *SS President Polk* to discharge cargo from Number 1 Hatch. On that day the chief officer of appellant told Bleile, the walking boss for Marine, to keep his eyes open because he believed there were some beams (also called "strongbacks") aboard with no locks and that such beams should be removed to the deck. Bleile testified, "He [chief officer] called me below. He said, 'Will you keep your eyes open? I believe I have strongbacks here which have no locks.'" Bleile instructed the stevedoring gangs at work to remove excess beams from Number 1 Hatch and to place them on the deck. Work continued that afternoon and on the following morning, January 30th, the stevedoring gang came aboard to uncover Number 1 Lower Hold and to load cargo into that hold beneath the beam in question. The forward section between the hatch coaming and the Number 2 Beam was removed by the longshoremen for the first time on January 30th to permit access to the lower hold, partially exposing the Number 2 Beam and revealing the missing locking device. The remaining sections of hatch boards were left in place, leaving only one section of the hatch open. Randolph, a gang steward employed by appellee, primarily charged with responsibility for safety, noticed

shortly after the work began that the safety lock or latch was missing on Number 2 Strongback. He knew that this was an unsafe condition in view of the fact that loading operations were being conducted beneath this beam. Randolph, upon discovery of this condition, reported it to his gang boss Swanson and to the walking boss Bleile, both employees of appellee. Swanson recognized that this condition constituted an unsafe condition, but did nothing about it. The work continued in the face of this knowledge until the accident occurred. The winchman testified that when only one section of the hatch was open, it presented too small an opening for the working of cargo. With the vessel down by the stern, the bridle in its movements up and down through the hatch opening swung toward the after end of the hatch so that it would strike against the partially exposed unlocked Number 2 Strongback.

The loading of the cargo here was conducted in the following manner: Oil drums were picked up off the dock by a bridle and sling operated by the winchman, and were lowered through the hatch opening into the hold where Williams and the other men would release the bridle from the drums. The winch driver would then raise the empty bridle out of the hatch with a swinging motion. Just prior to the accident Williams had released the bridle from some oil drums and as he attempted to check the swing of the bridle, the winch-driver pulled the bridle and hook up and away, and on its way up the bridle and the hook thereon hit the Number 2 Strongback, dislodged it and toppled it

into the hold below where it struck Williams. It was stipulated that the safety lock on the Number 2 Strongback was missing before the accident.

At the time of the accident there was no testimony that any officer of appellant was present at the scene of the operation in Number 1 Hold. Bleile testified that it was the practice for the gang steward to remove any unsafe condition found by the steward, and that he, Bleile, had given instructions to the gang boss on the day before the accident to stop the work and remove beams that were found unsafe. Swanson, the gang boss, admitted that he had been told of the unsafe condition by Randolph, and that it was his duty to report it to the walking boss, but that he had not done so.

Appellant contends that it is entitled to recover indemnity from appellee stevedoring contractor upon the following grounds:

1. That the conduct of American in providing a strongback without a locking device was at most proof of unseaworthiness, and that Marine was guilty of negligence in knowingly loading cargo under unsafe conditions, in negligently failing to remove the unsafe and lockless strongback during the work, and operating the bridle, sling and hook in close proximity to and against the unlocked strongback; that the negligence of Marine solely and proximately caused the accident; and that indemnity should be awarded in favor of appellant under common law.

2. That even if it might be said that American was negligent in providing the strongback with-

out a locking device, such negligence was passive and secondary, while Marine was actively and primarily negligent, and under such conditions Marine should pay indemnity.

3. That under the doctrine of *Ryan Stevedoring Co., Inc. v. Pan-Atlantic Steamship Corp.,* 350 U.S. 124, even in the absence of an express agreement of indemnity, a stevedoring contractor is obligated to reimburse a shipowner for damages caused to the shipowner by the contractor's negligent performance of his stevedoring contract.

In support of appellant's first contention that it is entitled to indemnity because it was guilty of only unseaworthiness and not negligence at all, while the negligence of Marine was the primary cause of the accident, it relies on *States SS Co. v. Rothschild International Stevedoring Co.,* 9 Cir., 205 F.2d 253; *Berti v. Compagnie Maritime Belge,* 2 Cir., 213 F.2d 397; *Valerio v. American President Lines,* D.C. N.Y., 112 F.Supp. 202. On the record before us, it cannot be said that the liability of American to Williams was based only upon unseaworthiness and not upon negligence. In the suit brought in the state court by Williams against American, the complaint alleged both unseaworthiness and negligence. The original complaint in this present action alleged that the suit by Williams against American was compromised because of the liability of American based on unseaworthiness. Thereafter, the complaint was amended to allege, *inter alia,* that the liability of American was based upon unseaworthiness and negligence. This

allegation was denied by the defendant, but the District Court below found that American was negligent, and while it variously characterized that negligence as passive and joint and concurrent, its basic finding of negligence is not clearly erroneous and cannot be set aside. Thus, it cannot be said that the only liability of American was for unseaworthiness, and the questions raised by this appeal will not be decided on this ground urged by the appellant in its first contention. Therefore, we turn to other grounds urged by the appellant as alternatives.

Under the second contention of appellant that its negligence, if any, was passive and secondary while the Marine negligence was primary and active, appellant relies in the main upon *U. S. v. Rothschild International Stevedoring Co.*, 183 F.2d 181, decided by this Court. In that case the stevedoring company used a winch supplied by the ship, knowing it to be defective, and while so using it the accident happened, causing the damages for which indemnity was sought. The Court there said, "It is clear that both the United States [the shipowner] and Rothschild were negligent. It seems equally clear that Rothschild had warning of the defect which was the immediate cause of the accident. With this knowledge Rothschild should not have permitted Dillon to work in this dangerous circumstance, as to which it was fully informed." The Court quoted from *Restatement of Torts*, §441, as follows:

> " '(2) The cases in which the effect of the operation of an intervening force may be important

> in determining whether the negligent actor is liable for another's harm are usually, but not exclusively, cases in which the actor's negligence has created a situation harmless unless something further occurs, but capable of being made dangerous by the operation of some new force and in which the intervening force makes a potentially dangerous situation injurious. In such cases the actor's negligence is often called passive negligence, while the third person's negligence, which sets the intervening force in active operation is called active negligence.' " 183 F.2d 181, 182.

In the Rothschild case this Court held that under the circumstances indicated above, the United States was entitled to full indemnity over against the stevedoring company.

In the instant case the Court below found that "the plaintiff's negligence was passive and that the defendant continued to work with the knowledge of the dangerous condition of the defective strongbacks."

Under these views it would appear that American being guilty of passive negligence could recover indemnity from Marine because of its active and primary negligence in permitting the work to continue under known unsafe conditions.

However, if our decision were to be placed upon this ground, there would remain the further question of whether indemnity upon this basis were barred by the Longshoremen's & Harbor Worker's Compensation Act. This question was expressly left open by

the Supreme Court in their decision in the Ryan case, 350 U.S. 124, 133, 132 fn. 6. Therefore, we prefer not to rest our decision upon this ground.

We now consider whether the decision in the Ryan case controls the decision here, as appellant urges in its third contention. In that case a longshoreman employed by Ryan Stevedoring Company was injured aboard a vessel when one of the paper rolls he was unloading broke loose and rolled over him because the rolls had no chocks, or supports, under them. The longshoreman sued the shipowner, and this suit was tried before a jury on the issues of unseaworthiness and negligence. The jury returned a general verdict for the longshoreman. The shipowner impleaded Ryan, seeking indemnity, and this action was tried by the Court on the record produced in the jury action. The evidence showed that Ryan had failed to put the chocks under the rolls when it loaded the cargo at a distant port and thus had improperly stowed the cargo. However, the ship's officer charged with supervising the stowage had failed to notice and correct this improper stowage of cargo. The Court denied indemnity and rendered judgment for Ryan. *Palazzolo v. Pan-Atlantic SS. Corp., et al.*, D.C. N.Y., 111 F.Supp. 505. On appeal to the Second Circuit, the judgment for the longshoreman was affirmed, but the judgment denying indemnity was reversed, upon the authority of the rule that indemnity is recoverable where the employer's negligence is the "sole", "primary" or "active" cause of the accident. *Palazzolo v. Pan-Atlantic SS. Corp.*, 211 F.2d 277, 279.

The decision of the Court of Appeals permitting indemnity was appealed to the Supreme Court and was affirmed by an equally divided Court in a memorandum opinion. *Ryan Stevedoring Co. v. Pan-Atlantic SS. Corp.*, 349 U.S. 901. The case was reargued before a full Court and the decision of the Court of Appeals affirmed, four members of the Court dissenting. The opinion of the Court dealt with two questions. The first was whether indemnity was barred by the provisions of the Longshoreman's and Harbor Worker's Compensation Act, 33 U.S.C.A. §901, *et seq.*; the second was whether, in the circumstances presented, Ryan was liable in indemnity. In answering the first question in the negative and the second in the affirmative, the Court proceeded solely on the basis of the contract existing between the parties. The Court stated, "Because respondent in the instant case relies entirely upon petitioner's contractual obligation, we do not meet the question of a noncontractual right of indemnity or of the relation of the Compensation Act to such a right." 350 U.S. at 133; see also p. 132 fn. 6. The contract between the parties contained no covenant of indemnity. The Court stated:

> "The shipowner here holds petitioner's uncontroverted agreement to perform all of the shipowner's stevedoring operations at the time and place where the cargo in question was loaded. That agreement necessarily includes petitioner's obligation not only to stow the pulp rolls, but to stow them properly and safely. Competency and safety of stowage are inescapable elements of the

> service undertaken. This obligation is not a quasi-contractual obligation implied in law or arising out of a noncontractual relationship. It is of the essence of petitioner's stevedoring contract. It is petitioner's warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product."

From the agreement, the Court implied that Ryan agreed to perform those services properly and safely in a workmanlike manner, and that this "amounts" to an agreement to hold the shipowner harmless for any damages caused it by breach of the stevedore's implied duty to perform his work safely. Since agreements to indemnify are not barred by the Compensation Act, indemnity was held not barred, and since the evidence showed that Ryan had not loaded the cargo in a safe and proper manner, it was held liable in indemnity.

The contract here also contains no language of indemnity. But it appears to provide a fuller and surer basis for implying a duty to perform services in a safe and proper manner. As set out above, Marine by its contract agreed to provide all labor and supervision necessary "for the proper and efficient conduct of the work and for the vessel's utmost dispatch." Furthermore, it agreed to "remove and replace beams * * *." When the shipowner through its ship's officer informed Marine that some of the beams were defective and requested that all excess beams be removed, Marine, knowing that Number 2 Strongbeam had no lock, was under a specific duty to remove that

beam. By failing to remove the beam and by continuing with the work under these hazardous conditions known to it, Marine breached its implied contractual duty to do its work in a safe and workmanlike manner.

The learned trial judge below did not have the benefit of the decision of the Supreme Court in the Ryan case, it having been decided subsequently to the opinion and judgment of the District Court rendered herein. Hence, the District Court did not proceed on this theory and entered no findings with respect to it.

The appellee contends that the Ryan case is distinguishable on two grounds: (1) The Ryan case only held that the Compensation Act does not bar indemnity; (2) The shipowner in the Ryan case was not negligent and was liable in damages only for an unseaworthy condition which it did not create, whereas in the case at bar, the contention is that the shipowner negligently caused the accident by supplying a defective strongback. The Ryan case did hold that the Compensation Act was no bar to indemnity based upon the breach of a contractual obligation. But we think that the Ryan case also held something more. It held that the shipowner is entitled to indemnity from the stevedore for damages caused the shipowner by the breach of an implied contractual obligation by the stevedore to perform its services in a safe and workmanlike manner. And the decision of the Court of Appeals in the Ryan case, in holding the shipowner liable to the longshoreman, expressly recog-

nized that the basis of that liability was either or both unseaworthiness or negligence. 211 F.2d 279. The Supreme Court, in affirming this decision, recognized that the Court of Appeals premised the shipowner's liability on both grounds.

It is true that in the Ryan case, the shipowner did not furnish a defective strongback. But there was evidence that the shipowner had failed to provide the proper chocks, as was his duty. See 350 U.S. at p. 139. But more importantly, we do not think that under the facts of this case it is at all material that the shipowner's negligence here arose from faulty strongbacks while in the Ryan case it arose from faulty supervision. Here, Marine was charged with notice before the accident from the ship's officer that some strongbacks were defective and from its own employees that the particular strongback involved here had no lock and was unsafe. It would have taken little time to remove the lockless beam. And there was testimony that it was the usual practice to lower the sling through as large an opening as possible. The longshoremen were aware that the sling had a tendency to swing back and forth, and that if the swing went unchecked, it was likely to strike something. Marine was in full control of the work and was in charge of this very situation. After Marine was notified of the defective beams by the shipowner, the shipowner did nothing to increase the hazard or to cause the breach of contract by Marine. Marine openly and plainly breached its obligation to perform its work in a safe manner. We think it is no defense to

that breach that American supplied the defective beam. The record shows that the negligence of the shipowner and the unseaworthiness of its ship were passive and secondary forces in causing the injury to Williams, and that the breach of obligation by Marine was the sole active or primary conduct causing the injury.

In the Ryan case it was contended by the stevedore that indemnity should not be allowed because the shipowner had been negligent in supervising the stowage of the cargo. The Supreme Court rejected that contention by saying, "Whatever may have been the respective obligations of the stevedoring contractor and of the shipowner to the injured longshoreman for proper stowage of the cargo, it is clear that, as between themselves, the contractor as the warrantor of its own services cannot use the shipowner's failure to discover and correct the contractor's own breach of warranty as a defense. Respondent's failure to discover and correct petitioner's own breach of contract cannot here excuse that breach." 350 U.S. 134-135. We are not concerned here with a situation in which the stevedore's breach of duty brings about the injuries by operation upon a prior condition caused by the shipowner's negligence which is unknown to the stevedore. Here the stevedore was fully informed of the fact and of the possible consequences of the shipowner's negligence or of the ship's unseaworthiness, and in face of all that proceeded to breach its duty so as to make that negligence an immediately dangerous force. It is true that here, unlike Ryan, there was

an act of unseaworthiness or negligence by the shipowner prior to the conduct of Marine, and that the shipowner's negligence consisted of failing to supply a proper device, rather than a failure to discover and correct the breach of duty as in the Ryan case. But this is no ground of distinction, for in the case at bar, as in Ryan, it was the stevedore's breach of duty that created the danger and made it an active condition with immediately foreseeable consequences of personal injury.

Indeed, the Court below found that "the plaintiff's negligence was passive and that the defendant continued to work with the knowledge of the dangerous condition of the defective strongbacks." (Finding No. 12.) The Court also found that it was the duty of the shipowner to supply, repair and maintain the locking device involved. The Court concluded from these facts, that both parties were jointly and concurrently negligent.

There thus appears to be a conflict between the findings of fact and the conclusions of law of the trial court.

Since there appears to be such a conflict, we are bound to accept the findings of fact which are not clearly erroneous, but we are not required to adopt the conclusions of law, but are free to adopt our own conclusions of law in the light of the facts and the applicable law.

The facts found by the court below are in no way inconsistent with our conclusion that the conduct of

Marine in performing its operations under knowingly unsafe conditions was the active and primary negligence which proximately caused the accident.

The appellee also urges that the decision in *Halcyon Lines v. Haenn Ship Corp.*, 342 U.S. 282, bars indemnity here. That decision was relied on by the lower court in holding that recovery by the shipowner was barred. However, the Supreme Court in the later Ryan case expressly held that in an action for indemnity based upon breach of a contractual duty, the holding in the Halcyon case was not applicable, it being an action for contribution from a joint tortfeasor and not an action for indemnity. The Ryan case also indicated that *American Mutual Liability Ins. Co. v. Matthews, supra,* was similarly distinguishable. Hence, we do not think that the decisions in the Halcyon and Matthews cases govern the issues here.

In the case at bar, the stevedoring contract more definitely and surely implies an obligation by the stevedore to perform his services in a safe and workmanlike manner than did the contract in the Ryan case. The facts of this case show that this obligation was plainly and openly breached. We hold, therefore, that the Ryan case squarely controls this case and that we are bound by the Ryan case.

The judgment is reversed with directions to enter judgment for appellant granting indemnity over.

(Endorsed:) Opinion. Filed June 14, 1956.

Paul P. O'Brien, Clerk.

No. 34,067

In the United States District Court for the Northern District of California, Southern Division

American President Lines, Ltd., a corporation,
Plaintiff,
vs.
Marine Terminals Corporation, a corporation,
Defendants.

JUDGMENT ON FINDINGS OF COURT FOR DEFENDANT

The above cause came on for trial on the 8th day of June, 1955, and was duly submitted for consideration and decision, and the Court, after due deliberation rendered its decision, and on the 1st day of August, 1955, made and filed its findings of fact, conclusions of law, and order for judgment.

NOW, THEREFORE, pursuant thereto, it is determined by the Court that plaintiff take nothing by this action and that each party bear its own costs.

Dated, August 1, 1955.

Michael J. Roche,
Chief Judge, United States District Court.

Acknowledgment of Service Attached.
[Endorsement]: Filed August 1, 1955.
Entered August 2, 1955.

In the United States Court of Appeals
For the Ninth Circuit

American President Lines, Ltd., a corporation, Appellant, vs. Marine Terminals Corp., a corporation, Appellee.	No. 14,959

On Petition for Rehearing

Before: Healy and Chambers, Circuit Judges, and Hamlin, District Judge.

The petition for rehearing and alternative motion for modification of order to permit retrial of new issues is denied.

/s/ William Healy
/s/ Richard H. Chambers
/s/ O. D. Hamlin

(Endorsed:) Filed July 19, 1956.

Paul P. O'Brien, Clerk.

OCT 15 1956
JOHN T. FEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 455

MARINE TERMINALS CORP., a corporation,
Petitioner,

vs.

AMERICAN PRESIDENT LINES, LTD., a corporation,
Respondent.

Brief in Opposition to Petition for Writ of Certiorari

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 455

MARINE TERMINALS CORP., a corporation,
Petitioner,

vs.

AMERICAN PRESIDENT LINES, LTD., a corporation,
Respondent.

Brief in Opposition to Petition for Writ of Certiorari

Respondent, American President Lines, Ltd., respectfully presents to this Honorable Court its brief in opposition to the petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

QUESTIONS PRESENTED

Petitioner has advanced in its lengthy list of "questions presented" a series of issues which, petitioner has asserted, are raised by the decision below. As we shall demonstrate there is substantially only one question presented in view of the reliance by the Court of Appeals on the decision of

this Court in *Ryan Stevedoring Co., Inc. v. Pan Atlantic Steamship Corp.*, 350 U.S. 124. Therefore, this court need resolve only the following single question as a basis for denial of the petition for certiorari.

Is a steamship company entitled to indemnity from a stevedore contractor when an employee of stevedore suffers injury, for which steamship company has responded in damages, by reason of stevedore's breach of its contractual obligation which creates the dangerous condition resulting in injury? The *Ryan* case answered this in the affirmative. The Court of Appeals in this case also so held.

STATEMENT OF THE CASE

Petitioner's statement of the case is only a partial recitation of facts relied upon by the Trial Court and the Court of Appeals in reaching their decisions in this case. The petition falls far short of an objective presentation of the controlling facts. Notably, it fails to include the relevant terms of the contractual obligation assumed by the stevedore and in failing to state those facts relating to the warning issued by the shipowner to the stevedore regarding the possibility of defective beams; the creation and the recognition by stevedore supervisory employees of the dangerous condition which existed by virtue of a particular defective beam; and their reckless conduct in continuing performance of stevedoring operations which led to the injury to Williams. Rather than restate these critical facts, we are content to refer to the decision of the Court of Appeals which supplies a fair and accurate summary.

REASONS FOR DENYING THE WRIT

Supreme Court Rule 19(b) sets forth the considerations which guide this Court in granting or denying a petition

for the writ. We do not read the Petition before us as suggesting that this Court resolve a conflict of decisions between Courts of Appeal. No substantial claim is made nor could be made that either the Trial Court or the Court of Appeals is guilty of any significant departure "from the accepted and usual course of judicial proceedings." Petitioner's argument centers upon this court's decision in *Ryan* and hence the question presented is whether or not the decision of the Court of Appeals for the Ninth Circuit is in conformity with *Ryan*. We submit that it is and that the petition should be denied.

Comparison of the Present Case with Ryan Stevedoring Co. v. Pan Atlantic Steamship Corp.

Two questions were before this court in the *Ryan* case. The first was whether an implied contractual indemnity was barred by the provisions of the Longshoremen's and Harborworkers' Compensation Act.[1] In answering this question in the negative, this Court had before it the agreement of the stevedore to perform all stevedoring operations required by the shipowner in its coastwise service. It was pointed out that the Compensation Act nowhere excludes or limits shipowner's right as a third person to insure itself against liability either by bond of indemnity or by consensual agreement to save the shipowner harmless. This court held that where there is a contractual undertaking to perform stevedoring duties safely and in a workmanlike manner, it amounts to an obligation, consensual in nature, to save the shipowner harmless when by breach of this obligation, injury occurs to one of stevedore's employees.

In the case presently before this court, a similar but formal contract was in force between the parties. The steve-

1. 44 Stat. 1424 (1927) et seq., as amended, 33 U.S.C. § 901 (1950) et seq.

dore's obligations of safe and workmanlike performance of its duties are set out with more fullness and certainty in the present case than in the *Ryan* case. The contract here set forth expressly that which the court found by implication in *Ryan*—stevedore's agreement to perform its services properly, safely and in a workmanlike manner. In both cases, the contract was interpreted as an implied indemnity agreement. The stevedore contract amounts to an implied obligation on the part of the stevedore to hold shipowner harmless for damages caused it by the breach of the stevedore's duty to perform its work safely. In each case, the provisions of the compensation act do not bar recovery based upon this contractual ground.

The second question before this court in *Ryan* was whether in the circumstances presented the stevedore was liable in indemnity. In that case, stevedore had improperly loaded or stowed the cargo. The ship's officers involved had failed to notice and correct the improper stowage. The longshoreman was injured aboard the vessel when a paper roll improperly stowed by his employer fell and struck him. The longshoreman sued and recovered against the shipowner on theories of both negligence and unseaworthiness on the part of the latter. In the shipowner's third party claim against the stevedore, this Court ruled that the stevedore agreement necessarily included stevedore's obligation to stow the rolls properly and safely as inescapable elements of the service undertaken. Since the improper stowage of the rolls produced either unseaworthiness or the hazardous working condition, an indemnity agreement was implied and stevedore was held liable to the shipowner.

In the present case, a defective hatch beam is involved. It was stipulated the vessel had an unlocked beam. Such a condition in and of itself provided no hazard. The ship-

owner warned the stevedore that some of the ship's hatch beams might be defective. One was defective—revealed when it was uncovered by the stevedores who recognized the danger yet recklessly continued to work in face of this known danger and performed their work in such manner that the cargo hook was permitted to strike the defective beam causing it to fall injuring Williams.[2] Ship's personnel were not in the area nor was knowledge about the specific defective hatch beam attributed to them. It was not known to ship's personnel that the stevedores had not removed the beam and were proceeding with the work under dangerous conditions. The condition, said the court below, was dangerous only when the beam was uncovered and when the cargo operations commenced beneath it. By its failure to remove the beam when discovered and by continuing to work in the face of known danger, the stevedore breached its express contractual obligation to remove beams and to perform work safely. (See next subheading.) The Court of Appeals basing its decision on *Ryan* pointed out that in each case stevedore's breach of duty created the danger and made it an active condition with immediately foreseeable consequences of personal injury. In each case this breach was the basis for the implied agreement by stevedore to hold the shipowner harmless.

We submit the foregoing disposes of any contention that the case at bar is not governed by this court's decision in *Ryan*. We do propose, however, to discuss in greater detail several points raised in the Petition.

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2. It is to be noted that Petitioner's comment at the bottom of page 13 and top of page 14 of the Petition, that Petitioner "failed to discover" the defective beam, is absolutely contrary to fact.

The Contract Entered into Between Shipowner and Stevedore Provides the Proper Basis Upon Which Indemnity Is Granted.

Petitioner makes the assertion that the contract is not at issue and that American President Lines' action for indemnity must be predicated solely upon the comparative negligence of the parties (Pet. 4, 5, 9). Yet, the Findings of Fact of the trial court acknowledge the existence of the contract (Tr. 34) and the Court of Appeals based its decision upon the express and implied contract terms. The Court of Appeals quoted the relevant portions of the contract to the effect that stevedore should:

> "* * * b. Provide all necessary stevedoring labor including winchmen, hatch tenders, tractor and fork lift operators, foremen and such other stevedoring supervision as are needed for the proper and efficient conduct of the work and for the vessel's utmost dispatch."
>
> "c. * * * Remove and replace beams, hatch covers and tarpaulins."

The Court of Appeals utilized this contract as the basis for allowing indemnity.

Petitioner contends that the contract was not properly pleaded or proven.[3] The existence of the contract was alleged in the complaint (Tr. 25) and its terms proven at the trial (Tr. 48). Reference to the dissent in *Ryan* indicates that in that case there was no such allegation and indeed a stipulation by the shipowner that the action proceeded on common law indemnity grounds rather than upon a contractual basis (350 U.S. 124). The majority opinion of this Court, however, reached its decision based squarely upon consensual grounds. We submit that there is even stronger

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3. Petitioner made this argument for the first time in its Petition for Rehearing before the Court of Appeals and it was rejected by that court in its denial of the Petition.

basis for giving effect to the stevedore's contractual obligations in the present case, because they were express rather than implied and the contract was pleaded and proven at the trial.

Even aside from the foregoing, it is now well recognized that the Federal Rules have done away with the narrow "theory of the pleadings doctrine". Thus, under the liberal rules of the reformed procedure, a plaintiff is entitled to recover, not on the basis of his allegations of damages or his theory of damages, but on the basis of the facts as to damages shown in the record. Rules 2, 8, Federal Rules of Civil Procedure; 2 Moore's Federal Practice 1656-7, § 8.14.

With some inconsistency, petitioner seeks to invoke *Porello* (*American Stevedores v. Porello*, 330 U.S. 446) to the effect that this case must be remanded to the Trial Court for interpretation of the contract terms. But the Court of Appeals here had no problem such as existed in the *Porello* case in determining the meaning of the contract. As this Court did with respect to the contract before it in *Ryan*, the Court of Appeals has interpreted the stevedore contract, concluding that it appears to provide even a fuller and surer basis for indemnity based upon an express duty to perform stevedoring services in a safe and proper manner. The Court of Appeals has held as this Court did in *Ryan* that there was an agreement by the stevedore to hold the shipowner harmless for injuries resulting from the breach of such duty. Any interpretation made by the District Court must of necessity be in conformity with the opinion of the Court of Appeals.[4]

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4. Any fears that petitioner may have that the Court of Appeals usurped the prerogative of the District Court in interpreting the contract should be disspelled by the observation that a District Court judge sat as a member of the Court of Appeals.

The Decision of the Court of Appeals Did Not Base Recovery Upon a Comparison of Fault as Between Shipowner and Stevedore.

Petitioner seeks to inject into this case a spurious issue of comparative negligence. It claims that this court left open in *Ryan* the question whether comparative fault of the stevedore and shipowner must be taken into consideration (Petitioner's Questions 1 & 2). The petition attempts to treat this case as one calling for comparison of fault as between the parties and urges upon this Court a denial of indemnity on the basis that the parties were equally or jointly and concurrently at fault (Petitioner's Questions 3, 4, 5, 6, 7, 8).

Our first reply is that joint and concurrent negligence is not involved. The finding of fact of the Trial Court emphasized the passive nature of the shipowner's conduct (Tr. 34). The Court of Appeals expressly rejected conflicting conclusions of law which attributed joint and concurrent negligence to both parties. The Appellate Court concluded that Petitioner's conduct "in performing its operations under knowingly unsafe conditions was the active and primary negligence which proximately caused the accident." This, surely, is not a finding of joint and concurrent negligence.[5]

Petitioner has misconceived the holding of the *Ryan* case as it applies to comparative negligence. Heretofore, the courts recognized a basis of liability for indemnity founded upon the relative responsibility of the shipowner and the stevedore for the tort irrespective of the nature of the contractual arrangement between them. In such cases, a finding that the stevedore's negligence was the sole, primary and proximate cause of the injury justified a recovery of in-

5. Respondent's recovery here is not a recovery for contribution from a joint tort feasor. *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 and *American Mutual Liability Ins. Co. v. Mathews*, 182 F.2d 322 (2d Cir. 1950) are not applicable.

demnity.[6] The Court of Appeals, below, did state that under such principles the respondent here could recover but did not base its decision on this ground. The Court of Appeals below recognized that the *Ryan* decision expressly refrained from deciding whether the provisions of the Compensation Act would bar recovery on the above non-contractual indemnity theory and for that reason it did not rest its decision on comparative negligence grounds.

The Court of Appeals, as this Court did in the *Ryan* decision which preceded it, emphasized that indemnity was based upon the stevedore's contractual obligation. It carefully distinguished a claim for indemnity merely based upon the ground that the shipowner and the stevedore contractor were each responsible in some related degree for the tort. The Court in each case found that a contract existed between the shipowner and the stevedore to perform the work safely and in a workmanlike manner. Such an agreement amounts to an undertaking to save the shipowner harmless for a breach of that obligation. The question which the court decided in both cases was whether, under the circumstances, the breach of the obligation was the cause of the injury. That being so, there is no basis for certiorari here.

We agree that had the issue here been one solely of comparative fault absent a contractual relationship between the parties and absent a breach of duty arising under the contract, that *Ryan* would not have resolved the issue of the exclusionary effect of the Compensation Act. However, the Court of Appeals did not reach this issue because it adopted the contractual basis of recovery approved by the *Ryan* decision. The question in each case is whether the breach of the contract caused the injury and in each case the answer is in the affirmative.

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6. The cases cited by Petitioner (Pet. p. 10, 11) belong to this group.

CONCLUSION

There is presented here no question or issue which has not been resolved by *Ryan*. Since the case below relied upon and is in accord with *Ryan* there is no basis for the writ to be granted.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: San Francisco, California this 12th day of October, 1956.

Respectfully submitted,

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